

## **APPEALED DECISION**

Stockholm City Court's decision of 16 February 2017 in case no. B 3787-16, see Annex A.

### **PARTIES (number of accused 1)**

#### **Counterparty (Prosecutor)**

Public Prosecutors [...] and [...]  
The Swedish Prosecution Authority

International Public Prosecution Office in Stockholm

#### **Appellant (Accused)**

[...]  
Citizen of Syria  
Detention: Under arrest

Representative and court-appointed lawyer: Lawyer [...].

## **THE CASE**

Crime against international law, gross criminal offence

## **THE JUDICIAL DECISION OF THE COURT OF APPEAL**

1. The Court of Appeal confirms the judgement of the District Court.
2. [The appellant] will be detained until the judgement against him for imprisonment and expulsion has obtained the force of "res judicata".
3. The District Court's decision on confidentiality shall prevail. The Court of Appeal decides by virtue of the same provisions on confidentiality for corresponding information, which has also been presented to the Court of Appeal in the main proceedings behind closed doors.
4. The Court of Appeal orders the payment of compensation from public funds to [the lawyer] of SEK 112,840, of which SEK 74,088 is for work, SEK 8,505 for waste of time, SEK 7,679 for expenses and SEK 22,568 for VAT. The state will bear the costs.



## **CLAIMS IN THE COURT OF APPEAL**

[The appellant] has claimed that the Court of Appeal should dismiss the action and set aside the decision on expulsion.

The prosecutor has opposed changing the judgement of the District Court.

## **THE FINDINGS OF THE COURT OF APPEAL**

### **Investigation**

The investigation is the same in the Court of Appeal as in the District Court. Additional hearings have been held with [the appellant] at his request.

### **Guilt**

[The appellant] has acknowledged that, in the context of a non-international armed conflict in Syria, as a member of the Suleiman combat group, he participated in the executions of seven soldiers from the Syrian army and that he shot one of the soldiers.

It is clear from his acknowledgement and other investigations (see paragraphs 16-19 in the judgement of the District Court) that [the appellant], together and in agreement with others during the period and at the location alleged by the prosecutors, intentionally took the lives of seven unidentified persons from the Syrian state's forces, who had been captured and were thus put out of action. After the captured soldiers were forced to their knees or to lie on the ground, several of them with their hands tied behind their backs, [the appellant] and other persons who participated in the executions fired a large number of shots at close range from firearms at the heads and bodies of the soldiers. During the incident, [the appellant] fired several shots with an automatic rifle, which hit one of the victims' head and body. The Court of Appeal shares the District Court's assessment that several of the soldiers had been mistreated before the executions (paragraphs 22-23 of the District Court's judgement) and that as a consequence of this, they were injured at the time of the execution, although it was not established that the injuries were extensive.

The Court of Appeal further agrees with the District Court's assessment that in May 2012, there was a non-international armed conflict in Syria, and notes that during his questioning, [the expert witness M.] explained why that was so. This means that international humanitarian law is applicable (IHL).

[The appellant] has objected that he cannot be convicted because he participated in carrying out a death sentence issued by a legitimate court following a legal process that met the requirements of IHL. In any case, he came to that understanding based on the information he received from the leader of the Suleiman combat group. He therefore had no intention to participate in extra judicial killings. Although the proceedings were flawed, he was not responsible for them.

The Court of Appeal then goes on to investigate whether [the appellant] should be convicted of a crime.

The Court of Appeal shares the District Court's assessment that, in certain situations, a non-state actor must be able to establish its own courts. As the District Court also found, such a conclusion is supported by subsequent comments on Article 3 of the Geneva Conventions (see ICRC, Commentary on the Second Geneva Convention, 2017, paragraph 700 et seq). As the District Court also found, the Court must meet the requirements for independence and impartiality, and the court process must meet

the basic requirements of a fair trial. The commentary from 2017 describe certain minimum requirements for the process arising from customary international law (paragraph 706 f).

[The expert witness K.] has explained that in spring 2012, there were no courts or court-like institutions in the rural area of Idlib, and that the opposition only began to organize the legal system later in 2012. [The expert witness K.] has also stated that he was the first judge who defected in the summer of 2012.

[The expert witness K.] has credibly explained why he is aware of the conditions in Syria pertaining to this matter. His information is also consistent with the reporting, including from the COI, regarding the situation in Syria during the relevant period for this case (see note 21-23, p.33-34 in the District Court's judgement). The Court of Appeal finds no reason to challenge the information provided by [the expert witness K.].

Against this background, it may be questioned whether, in May 2012, the Suleiman combat group carried out executions as part of legal processes meeting the requirements of IHL, irrespective of whether or not it was part of the FSA.

The captured soldiers were filmed before the executions. For example, the captured soldiers can be seen on film, along with members of the armed groups who carried out the attack, and who pose in the film with their weapons. In the film, a speech is given pertaining to the armed conflict. The film gives a clear impression that the soldiers are being displayed for propaganda purposes.

The films of the executions show that the soldiers were partially undressed for the executions, several had visible injuries after mistreatment on their backs and their hands were tied behind their backs. The executions were preceded by a speech about revenge, and after the executions, some of the men who participated raised their weapons, as in a victory gesture. In examining the films, the Swedish National Forensic Centre found that 70-80 shots were fired by 9 different shooters at the executions.

The subsequent handling of the bodies, which was also filmed, was very offensive and in that context also, statements were made in connection with the armed conflict and revenge.

[The appellant] has denied that he was present when the bodies were thrown into the well.

The films from the executions and the subsequent handling of the bodies give the impression that everything takes place in a single context. The National Board of Forensic Medicine has also drawn that conclusion. In addition, it was mentioned in one of the films from the executions, when [the appellant] was present, that the bodies would be thrown in the well. In a film showing the handling of the bodies (film 0), a person is shown who apparently resembles [the appellant].

Like the District Court, therefore, the Court of Appeal arrives at the conclusion that [the appellant] participated in the subsequent handling of the bodies.

There is nothing in the films to indicate that the executions can be explained by them being part of a legal process, as [the appellant] claims. The content of the films instead gives a clear impression that the motive was to take revenge. The films strongly support that this concerned unlawful executions.

The Court of Appeal shares the assessment of the District Court that the attack must have taken place on the night turning to 5 May 2012. The timing is shown on the Suleiman group's Facebook page. The information in the entries about the attack are detailed and it is indisputable that other parts of the content are correct. There is no reason to question the information in the entries about the time of the attack.

The Court of Appeal also shares the District Court's conclusion, primarily based on what the District Court points out in paragraphs 58-60, that the soldiers must have been executed on the evening of 6 May 2012.



(The appellant] has a different view of the timing of the attack and the executions, respectively. However, he has drawn his conclusions based on what he has read in the preliminary investigation and what he can subsequently remember about how long he was in Turkey, i.e. he has no clear recollections of his own. The information about the date of the burial film does not contradict the other findings. [The appellant] information does not therefore affect the assessment of the Court of Appeal.

This means that the time-span between the attack and the executions amounts to just over 1.5 days. Against this background, it was ruled out that a fair trial was conducted. The fact that the executions were not preceded by a legal process according to the requirements of IHL is also supported by the other investigations outlined above. The Court of Appeal therefore concludes that the executions were unlawful. The Court of Appeal would have reached the same conclusion even if the time-span between the attack and executions had been a few days longer, as [the appellant] claimed.

The Court of Appeal then considers whether [the appellant] had the necessary intent.

[The appellant] was involved in the situations recorded as described above, and thus he has been aware of what happens in the films. He could not have avoided seeing that the soldiers had been mistreated. He repeatedly shot the automatic rifle at the victim and after the executions, he raised the weapon as in a victory gesture. The content of the films already provides a basis for the conclusion that this is a matter of a deliberate, extrajudicial killing.

The Court of Appeal then assesses whether [the appellant's] information about the course of events before then should affect the judgement of the Court of Appeal.

[The appellant] has stated that he did not make any personal observations of the legal process, but that he received information from the leaders.

[The appellant's] story contains few details. This could certainly be explained by the fact that it was a long time ago. However, his account also appears to be strange and unlikely, for instance that there had been occasion to call witnesses.

[The appellant] has not been able to provide further details about what crimes the soldiers are supposed to have committed, or when and where it was supposed to have taken place. He cannot explain why he thought it was possible to convict soldiers who were in an area that was not controlled by the opposition.

[The appellant] has also provided other information in police questioning on 23 March 2016, which does not indicate that the soldiers were sentenced to death because they committed crimes like murder and rape.

Information from police questioning must be assessed with great caution. However, [the appellant] was asked clear questions and provided detailed answers. In addition, the questioning of 23 March 2016 was interpreted, and after reinterpretation, [the appellant] had no comments on the translations of the relevant parts. His explanation about what he really meant is not supported by the police questioning. The Court of Appeal finds that there is nothing to indicate that there was a misunderstanding.

The Court of Appeal concludes overall that [the appellant's] information cannot be relied upon. Therefore, they do not lead to any other assessment of the examination of in the case.

[The appellant] was aware of the brief time between the attack and the executions. It is ruled out that [the appellant] could have believed that the soldiers were able to influence the outcome. He must have been aware that the soldiers were executed solely because they were regime soldiers. The



investigation shows in summary that [the appellant] realized that they had no right to execute the soldiers.

The Court of Appeal's conclusion about [the appellant's] knowledge means that there is no need to address his other objections, such as that he cannot be held responsible because he was only following orders.

This means that [the appellant] is deemed to be responsible. The Court of Appeal makes the same assessment as the District Court on the issue of classification. Thus, the District Court's judgement should not be amended in respect of guilt.

### **Sanctions**

The Court of Appeal's judgement is not different than that of the District Court in respect of sanctions. There are no mitigating circumstances.

### **Expulsion**

For the reasons given by the District Court, the prosecutors' request for expulsion must be approved.

### **Detention**

The grounds for detention provided by the District Court remain.

### **HOW TO APPEAL**, see Annex B

The deadline for appeals is 28/06/2017.

Senior Judge of Appeal [...] (chairman), Judge of Appeal [...], Rapporteur [...], and lay assessors [...] and [...] have participated in the decision.

## **Annex A**

STOCKHOLM DISTRICT COURT,

Case no: B 3787-16

Section 4

Judgement 16/02/2017

**PARTIES** (Number of accused: 1)

### **Accused**



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[...]

Detention: Under arrest

Citizen of Syria

Court-appointed lawyer:

Lawyer [...]

### **Prosecutor**

Public Prosecutors [...] and [...]

The Swedish Prosecution Authority

International Public Prosecution Office in Stockholm

### **JUDGEMENT**

#### **Crime for which the accused is convicted**

Crime against international law, gross crime, Chapter 22, Sections 6.1 and 6.2 of the Penal Code, as worded prior to 1 July 2014

05/05/2012 - 07/05/2012

#### **Sanctions etc.**

Life in prison

#### **Expulsion**

The accused is expelled from the kingdom pursuant to Chapter 8a, Section 1 of the Aliens Act (2005:716), and is prohibited from returning. Violation of the ban may result in imprisonment for a maximum of 1 year.

#### **Detention etc.**

[The accused] will remain in detention until the judgement has obtained the force of "res judicata" against him in terms of sentencing and expulsion.

#### **Confidentiality**

Confidentiality according to Chapter 5 Section 1 of the Code of Judicial Procedure and Chapter 21 Section 1 of the Public Access to Information and Secrecy Act (2009:400) shall continue to apply to those films that have been shown behind closed doors during the main proceedings at the District Court.

#### **Crime Victim Fund**



The accused is ordered to pay a fee of SEK 500 pursuant to the Fund for Victims of Crime Act (1994:419).

## **Compensation**

[The lawyer] is awarded compensation from public funds of SEK 415,434. Of this amount, SEK 83,087 is to cover VAT. The cost of the defence shall be borne by the state.

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### **V. HOW TO APPEAL**

## **I. BACKGROUND**

*This section provides a brief account in chronological order of the events, circumstances and decisions that are significant in the case and which form the basis for the prosecution.*

During the spring of 2011, major popular uprisings began in many countries in the Middle East and North Africa. The main demand of the protest movements, which came to be known as the "Arab Spring", was that the ruling dictator in the different countries should resign. In Syria, several armed groups participated in the uprising against President Bashar al-Assad; both the secular Free Syrian Army (FSA) and several islamist resistance movements. When the Arab spring broke out, the Syrian citizen [accused] was in Italy, where he had a residence permit since 13 March 1999. He was active against the regime in Syria and was a member of the protest movement "Manifestazioni Siriani a Milano" ("Syrian Demonstrations in Milan").

On 10 February 2012, [the accused] and other Syrian citizens participated in a demonstration at the Syrian Embassy in Rome. During the demonstration, an intrusion was made into the embassy. The



event was filmed by [the accused], who was arrested together with other protesters suspected of damage and maltreatment of two embassy officials.

On 30 April 2012, [the accused] flew from Milan to Istanbul and onwards to Hatay Airport in southern Turkey. He met up with a friend there. They went together to Kafar Kila, located in the rural area of Idlib province in north-western Syria. The distance between Hatay and Kafar Kila is about 35 km. Kafar Kila was the headquarters of the armed opposition group "the Suleiman combat group" (Firqat the Suleiman el-muqatila). The Suleiman combat group was established in late 2011 by [S.] and was mainly active in the Djebel el-zawia region in Idlib's hinterlands and in the hinterlands of Hama, which were strongholds for Syria's islamist resistance movements. The group leader, [S.], controlled thousands of fighters, who organized bases and transported supplies in from Turkey. The Suleiman combat group was well supplied and funded and attracted many fighters.<sup>1</sup>



Image: Kafar Kila circled

In early May 2012, the Suleiman combat group and another armed opposition group, the Ahrar Alshamal Sermin battalion, attacked a Turkish military post immediately outside Delbiya, a town located about 15 km west of Kafar Kila at the border with Turkey.

The information differs regarding the precise time of the attack. According to the prosecutor, the attack occurred on the night of 5 May 2012, while [the accused's] view is that it took place on 4 May 2012.

Syrian soldiers were captured in the attack on the military post in Delbiya. A member of the Suleiman combat group, [K.], was also killed. The captured soldiers were initially brought to the base in Kafar Kila. The burial of [K.] was held elsewhere and filmed by [the accused].

After a while, the captured soldiers were taken to a place outside Kafar Kila. Members of the Suleiman combat group posed there later, including [the accused] and members of the Ahrar Alshamal Sermin battalion, along with the captured Syrian soldiers and weapons that had been taken in the attack. The posing was documented on film. Seven of the captured soldiers were then executed

<sup>1</sup> 1 "Ulbrief Syrisk djihadism" [...], Swedish Institute of International Affairs, No. 13 of 14 September 2012, p. 44-45.



by members of the Suleiman combat group. After the execution, the bodies of the executed soldiers were thrown into cavities in the ground. The execution and subsequent handling of the dead bodies was documented on film. The information differs regarding the time of the posing/execution. According to the prosecutor, it occurred on the night of 6 May 2012, while [the accused's] view is that it took place on 7 May 2012. The District Court will return to the issue of the timing of the attack and execution in the handling of [the accused's] criminal law objection in section A.v of the judgement.

On 18 June 2013, [the accused] travelled from Lebanon via Brussels to Sweden. He applied for protection here as a refugee. The file from the Swedish Migration Agency shows that when he was questioned, [the accused] stated that he had never been involved in fighting in Syria, and he denied that he had access to his passport or that he had previously had or applied for a residence permit in Europe.

On 5 September 2013, the online edition of the New York Times published a partially censored video from the Suleiman combat group's execution of the seven Syrian soldiers.

On 17 October 2013, the Swedish Migration Board decided to grant [the accused] a permanent residence permit and refugee status.

The Swedish police subsequently received information that [the accused], who the Italian police were able to identify on the film from the execution, was living in Sweden. The police therefore initiated a preliminary investigation into suspected serious international crimes.

An arrest warrant for [the accused] was issued on 11 March 2016. Since 13 March 2016, he has been under arrest in the case, suspected of serious international crimes.

On 17 March 2016, the Government decided that the Stockholm District Court is the competent forum for the case. The government also granted a prosecution permit on 27 October 2016 for the crime in question.

## **II. CLAIMS**

### **A. CRIMINAL RESPONSIBILITY AND EXPULSION**

The prosecutor has requested that [the accused] should be sentenced for crime against international law, gross crime, Chapter 22, Sections 6.1 and 6.2 of the Penal Code as worded prior to 1 July 2014, and the common Article 3 of the Geneva Conventions I-IV, or for murder under Chapter 3, Section 1 of the Penal Code, all according to the following statement of the criminal act charged.

"In the spring of 2012, there was a non-international armed conflict in Syria between the state of Syria on one side and a number of armed groups on the other.

At the beginning of May 2012, [the accused] was recruited by an armed group called the Suleiman combat group (firqat the Suleiman el-muqatila). As a member of the group, together and in agreement/consultation with other perpetrators, sometime between 5-7 May 2012 in Idlib Province in Syria, he intentionally took the lives of seven unidentified persons from the Syrian state's armed forces, who had been captured and were thus put out of action. After the captured soldiers were forced to their knees or to lie on the ground, several of them with their hands tied behind their backs, [the accused] and other perpetrators fired a large number of shots at close range from firearms at the heads and bodies of the soldiers. During the incident,



[the accused] fired several shots with an automatic rifle, which hit one of the victims' head and body.

In any case, [the accused], together and in agreement/consultation with other perpetrators, carried out a death sentence through the above-mentioned procedure that had been issued by a non-legitimate court and following a procedure that did not meet the essential requirements for a fair trial in accordance with international humanitarian law.

Through the said act against seven persons who had been put out of action, [the accused] committed a serious violation of Article 3 of the Geneva Conventions I-IV, as well as generally recognized principles relating to international humanitarian law. The offence is considered serious because many people were executed in particularly cruel circumstances, where the victims, who at the time all had extensive injuries after being mistreated, completely lacked the opportunity to defend themselves and obviously understood that they were to be killed".

Furthermore, the prosecutor has requested that [the accused] should be expelled from the kingdom and prohibited from returning.

## **B. POSITION**

[The accused] has not contested that there was a non-international armed conflict in Syria in spring 2012 as the prosecutor claims. He has acknowledged that in the context of the conflict, as a member of an armed group called the Suleiman combat group/firqat the Suleiman el-muqatila, and at the time and place alleged by the prosecutor, he participated in the execution of seven persons, all of whom had injuries, and that he himself shot one of them in accordance with the prosecutor's assertions. However, he has contested criminal responsibility for the act because it involved carrying out a death sentence issued by a legitimate court, following a procedure that complied with the essential requirements for a fair trial in accordance with international humanitarian law. He further contests the request for expulsion and claims that there are absolute impediments to enforcement.

## **III. INVESTIGATION**

### **A. EVIDENCE**

#### **i. Oral**

An interview was conducted with [the accused].

[Expert witness M.] was consulted concerning the conflict in Syria in the period 2011-2012, as well as on the conditions for a non-state actor to establish courts and impose penalties and escape criminal responsibility for acts that would otherwise be considered war crimes.

[Expert witness L.] was consulted about what was contained in films, etc. regarding Islamist terminology.

[Expert witness K.] was consulted about the Syrian judicial authorities, both before and after the Syrian revolution.

#### **ii. Written**

*a) Armed conflict in Syria and extrajudicial executions*



Statistics from the UN High Commissioner for Human Rights, Reports from the UN Human Rights Council, Independent International Commission of Inquiry on the Syrian Arab Republic (COI) Report No. 3-4, COI Oral Update of 26 June 2012, PM from COI , Report of Human Rights Watch, "They Burned My Heart - War Crimes in Northern Idlib during Peace Plan Negotiations", Map of refugee flows produced by U.S. Department of State, Report from the Institute for the Study of War - "Syria's maturing insurgency", Operational update from the International Committee of the Red Cross of 17 July 2012, ICRC News Release dated 27 May 2012, Extract from the ICRC's website, Report from Human Rights Watch dated 17 September 2012 - "Syria: End Opposition Use of Torture, Executions", Amnesty International Briefing dated 14 March 2013 "Syria: Summary killings and other abuses by armed opposition groups" and supporting documents written by [expert witness M.].

b) *[The accused's] background*

Excerpts from the Italian migration authority, PM from the police authority in Milan, PM and screen dump regarding film from Syria's Embassy in Rome in 10 February 2012, and expert opinion from NFC dated 7 March 2016 regarding fingerprint examination and ID report.

c) *[The accused's] trip to Syria and participation in the armed group.*

PM and photocopies of [the accused's] passport, PM about Facebook profiles from the Italian police authority in Milan, and a PM on posts on Facebook and a UD text by author [...] dated 14 September 2012, "Syrisk Djihadism".

d) *The criminal act*

Maps, PMs and screendumps about films secured from YouTube, FBI memorandum about time and time zone on Google, Information from Google regarding time and date of publication, Translation of speeches in films, Extracts showing the time of sunrise and sunset, Response from US Authorities regarding Facebook accounts and translation of extracts from Facebook accounts, as well as translations of selected posts and comments, Expert opinion from NFC, Forensic medicine opinion from the National Board of Forensic Medicine and PM from the police authority in Milan dated 9 and 10 May 2012.

e) *Other*

The Swedish Migration Agency's file concerning [the accused's] contacts with the Swedish Migration Agency, YouTube films showing the intrusion and damage to Syria's embassy in Rome, an interview with[S.] and a film about parts of the execution published on the New York Times website on 5 September 2013, and other films from the execution, etc.

## **B. [THE ACCUSED'S] INFORMATION**

He resided in Italy in the period before the events. He worked in trade and, among other things, was employed in the construction industry where he performed electrical installations. He is a qualified electrician. He became involved in opposition to the Syrian regime and joined an organization in Italy.

FSA was established in the summer of 2011. It is a military organization that is on the opposition side. It had the same goal as the revolution, to topple the regime and to establish a free regime. He decided to join the armed opposition, namely the FSA. He went to Hatay in Turkey where he met a friend who was a member of the Suleiman combat group. The following day, on 1 May 2012, they went to Kafar Kila, where the Suleiman combat group had its base. They arrived late in the afternoon. He met the leader of the Suleiman combat group, [S.], and was accepted as a member of the group. The Suleiman combat group was part of the FSA. They communicated with each other. That was the information he received.



Northern Idlib's hinterland was considered a liberated area. There were forces of the regime located outside the towns, but the area was under the control of the opposition. However, this changed from day to day. One day the regime could have taken control of a town/city, and the next day the opposition could have taken it back. He does not remember who controlled Delbiya. The regime's soldiers did not move freely in the areas where they had military facilities, but they were protected by being in the military facilities and they did not control the social functions. There were cities that were completely liberated. Social functions were maintained by the opposition and the FSA.

The day after he had arrived at Kafar Kila, he received weapons and started training. He has three years of experience from the mandatory military service in Syria. He was 2-3 days in Kafar Kila before the attack on the military post in Delbiya. During the attack, his task was to guard a connecting road to prevent reinforcements reaching the military post. At the military post, a large number of offences had been committed against refugees, such as rape and murder. They were victorious in the battle that occurred during the night of 4 May 2012. When he returned to the base in the morning, he received information that eleven people had been captured during the operation. They were held in a room in Kafar Kila. A military council had decided they should be detained. None of the members of the Suleiman's combat group were on the military council, but it was an activity under the FSA. Two of the captured soldiers were informers and were released. He saw nine people through a window or door to the room where they were locked in.

He was assigned the task of taking care of the burial of the martyr [K.], who had been killed in the military operation. The body was at another location. He therefore left the base to do this at dawn on 4 May 2012. The film of the funeral shows that he states the date to be 4 May. When he returned to Kafar Kila from the funeral later on the same day, he was informed that the military council had decided that the prisoners should be moved to another location, 2-3 km from the base. This had already happened. The military council had informed the judicial council, which consisted of judges who had previously served the regime, but who defected to the FSA. They came from liberated areas where they were operating. He heard that there were three judges. Both military and civil witnesses were called to the trial, including people who had defected from the military post. That was 5 May 2012 and it occurred on 6 May 2012. He himself was not present during the trial. He was informed of the charges directed against the prisoners and that witnesses had been called. It was widely known that the military facility that the prisoners had come from had committed horrific crimes like rape and assassination of civilians who were refugees. These are crimes that receive the death penalty in Syria. He received all his information from [S.].

On 7 May 2012, he was informed by [S.] that the court had issued a death sentence against seven of the prisoners for rape and murder of civilians and had acquitted two of the prisoners. As far as he knows, those who had been convicted had confessed to their crimes. He does not know the names of those executed and does not really remember when the crimes they were convicted of were committed, but it was in the context of the refugee flow when refugees passed the military post. He does not know how they committed the crimes. He does not know the names of the victims or how many were victims of crimes. The captured soldiers were convicted according to Syrian law. He travelled with other members of the Suleiman combat group from the base of Kafar Kila to the place where the prisoners were. When he got there, the prisoners were already lined up. They then recorded a so-called posing film with the prisoners and the weapons they had captured in the attack. He does not remember when it was, but it probably happened in the middle of the day. He was told that civilians had previously gone to the site where the prisoners were and mistreated them.

He was then ordered [S.] to take part in the execution squad that would carry out the death penalty. He agreed to participate in the firing squad because of his conviction that these people had committed serious crimes against women and refugees according to a court that had convicted them in a fair trial. He did not participate because of revenge. [S.] explained what would happen. The firing squad was



formed not long after the posing film. It was the same day and he thinks it happened in the afternoon. He does not remember what [S.] said in his speech before the execution. He left immediately after he had carried out the death penalty and was not there afterwards when the bodies were thrown into a well.

He had no reason to doubt that the trial was fair and correct. He regarded it as a proper court that had applied Syrian law. He assumed so. He trusted the information he received. Otherwise, he would never have participated.

There is a natural delay in the posts made on Facebook or other digital media when the Suleiman combat group provided information and images, which relied on a connection in the area to administrators who resided in Saudi Arabia, the UK or Turkey. They brought satellite communication equipment with them and had access to the internet.

There was a great deal about him in the media in Italy. Because he felt bad psychologically, he decided to leave Italy. He went to Lebanon and stayed there for six months with his family. But it was dangerous to stay there because of his participation in the war, so he went to Sweden. When he came here, he did not want to talk about the war.

## **IV. THE COURT FINDINGS**

### **A. CRIMINAL RESPONSIBILITY**

1. The District Court first describes the legal regulations (section i.), and then makes a general assessment of the value of the invoked written evidence (section ii.). The District Court then examines whether there was a non-international armed conflict in Syria at that time (section iii.), and whether it has been proved that [the accused] has executed captured soldiers in the manner alleged by the prosecutor (section iv.). Before the District Court determines whether the execution of the captured soldiers may have been preceded by a trial (section vi.), the District Court makes a legal assessment of the conditions under which a non-state actor may establish courts in the manner claimed by [the accused] (section v.). Finally, the District Court considers the issue of classification (section vii.).

#### **i. Legal basis**

2. The penal provision for crime against international law that is applicable in this case is found in Chapter 22 Section 6 of the Penal Code, in its version before 1 July 2014. According to the penal provision, a person may be convicted if they have committed a serious violation of such an agreement with a foreign power or any such generally recognized principle, concerning international humanitarian law in armed conflicts. If the crime is serious, the person can be imprisoned for a maximum of eighteen years or for life. When assessing whether the crime is gross, "particular consideration shall be given to whether it was committed through a large number of separate acts or if many people were killed [...]".

3. The Geneva Conventions I-IV (GC I-IV) contain certain basic guarantees that apply in the event of an armed conflict that is not international in nature and which occurs in the territory of one of the Contracting States. These guarantees are set out in Article 3 of each of GC I-IV (GA3) and in Additional Protocol II, relating to the protection of victims of non-international armed conflicts (AP II) from 1977. AP II is a supplement to GA3 and reinforces the protection for vulnerable groups in non-international armed conflicts. The detailed guarantees in question are set out in Article 4 of AP II.



4. Syria signed up to the Geneva Conventions in 1953 and is bound by them. However, it did not sign up to the Additional Protocols.

5. According to the content of GA3, the protected persons must be treated humanely. The article explicitly prohibits, inter alia: (a) violence to the life and well-being of a person, especially murder in all its forms, mutilation, cruel treatment and torture; (c) outrages upon personal dignity, in particular humiliating and degrading treatment.

6. Article 4 of AP II states that in all cases, the protected persons must be treated humanely and not be subject to adverse distinction. Among other things, it explicitly prohibits the following actions: (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment, and (e) outrages upon personal dignity, in particular humiliating and degrading treatment.

7. The examples of severe violations given in Chapter 22 Section 6 of the Penal Code are derived from the Geneva Conventions' list of "grave breaches", something that is described in more detail in e.g. GC III, Article 130 and GC IV, Article 147.<sup>2</sup> These include the following violations of rules with regard to protected persons: Wilful killing, inhuman treatment, wilfully causing great suffering or serious injury to body or health and unlawful confinement. In this context, there are grounds to emphasize that certain acts may naturally involve infringements of several prohibitions, so-called compound crimes, that affect the assessment of the severity.

8. In armed conflicts of international character, it is essential to clarify whether the actors have a status as combatants. For non-international conflicts, there is no such status. The fundamental guarantees expressed in GA3 and Article 4 AP II, apply to persons who do not actively participate in the fighting or who have ceased to participate because they were captured or detained. Thus, the categories referred to are civilians and people commonly referred to as hors de combat.

9. In non-international conflicts, individual civilians may also be guilty of war crimes under international humanitarian law.<sup>3</sup> This requires that there is a link between the criminal act and the armed conflict. Privately motivated crimes, without such a link, are not to be regarded as a war crime. In order for such a link to be deemed to exist, the conflict must have played a significant role for the perpetrator's ability to perform the act, or their decision to perform the act, the manner in which the act was performed or the purpose of the act.<sup>4</sup>

## **ii. Assessment of the written evidence, etc.**

*- There are no grounds to question the general picture that reported country information provides in reports from international organizations regarding Syria in general and the Idlib region in particular.*

*- The evidential value of information provided in police interrogations and presented in the trial is considered higher than otherwise, if the information is supported by information in reports from international organizations.*

*- The section presents the reasons for this position.*

10. The District Court notes that the reports, referred to by the prosecutor, from international organizations such as the United Nations (UN) and non-governmental organizations (NGOs) and other independent institutions, are based on a sound investigation material. There are no grounds to

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<sup>2</sup> See "Internationella straffrättsutredningen", SOU 2002: 98, p. 241 f.

<sup>3</sup> See ICTR-96-4-T, Akayesu, Judgement of 2 September 1998, p. 633.

<sup>4</sup> See IT-96-23 & 23/1-A, Kunarac, Judgement of the Appeals Chamber of 12 June 2002, p. 58.





question the general picture that reported country information provides of Syria in general and the Idlib region in particular.

11. When questioned in the District Court, [the accused] has in several respects deviated from what he has previously said in police questioning. The information from questioning in the preliminary investigation has therefore been presented during the main proceedings. Such information should generally be assessed with caution. There may be several possible sources of error for such information. For summaries of questionings, for example, it may be unclear what questions were asked and what conditions were close at hand for the interviewee to talk about. Information in so-called dialogue questioning should therefore generally be considered as having a higher evidential value. The evidential value increases to the extent that such information is supported by other evidence, such as information in reports from international organizations.

### **iii. Non-international armed conflict in Syria in May 2012**

*- The investigation shows that at the time of the relevant events in May 2012, there was a non-international armed conflict in Syria, which means that international humanitarian law is applicable.*

*- The section presents the reasons for this position.*

12. In order for it to concern an armed conflict of non-international character, there needs to be extensive armed violence between government forces and armed groups, or between different armed groups. Statistics on the number of killed in Syria per month were sharply increasing during the period January 2012 to August 2012. During the period from May to June 2012, the flow of refugees from Syria also increased, and an estimated 1.5 million people were considered to be in urgent need of assistance, compared to one million people previously. These circumstances, as well as other information relating to extensive armed violence in reports from international organizations in the spring of 2012, meant that there is no doubt that the intensity of the armed conflict had reached the level required to constitute a non-international armed conflict.<sup>5</sup> This, together with the increasing ability to organise themselves, as documented among opposition armed groups with command and control, means that it has thus been clarified by the investigation that, at the time of the events in May 2012 that are the subject of this case, there was a non-international armed conflict in Syria.<sup>6</sup>

13. In that situation, the actions of all forces who participated in conflicts, including opposition armed groups, are subject to international humanitarian law. Based on the treaty, the rules regarding GA3 are already applicable to the conflict in Syria. Furthermore, AP II is applicable based on customary law. These provisions therefore form the basis for the further criminal law assessment in the question of crimes under international law.

14. However, the District Court must first consider whether it has been proven that during the non-international armed conflict in Syria, [the accused] executed seven people who had been put out of action in the manner alleged by the prosecutor.

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<sup>5</sup> UN High Commissioner for Human Rights, Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic, p. 7.

<sup>6</sup> Independent International Commission of Inquiry on the Syrian Arab Republic, Report No 3, p. 6, 9, 45, 47, Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic of 26 June 2012, p 19-20 para. 104-105, Report of Human Rights Watch, May 2012 "They Burned My Heart - War Crimes in Northern Idlib during Peace Plan Negotiations, p. 3 and 32 and Report from the Institute for the Study of War, Middle East Security Report no. 5 - "Syria's maturing insurgency" June 2012, p. 7 and 14, and the International Committee of the Red Cross (ICRC), News Release dated 27 May 2012 and Operational Update of 17 July 2012.

#### iv. The execution of seven persons

*- It has been proven that in Idlib Province in Syria, together and in agreement/consultation with other perpetrators, at the time, place and in the manner alleged by the prosecutor, [the accused] took the life of seven unidentified persons from the Syrian state's armed forces, who had been captured and were thus put out of action.*

*- The section presents the reasons for this position.*

15. [The accused] has acknowledged that in the context of the conflict in Syria, as a member of an armed group called the Suleiman combat group/firqat the Suleiman el-muqatila, and at the time and place alleged by the prosecutor, he participated in the execution of seven persons, all of whom had injuries, and that he himself shot one of them in accordance with the prosecutor's assertions. However, he has denied that the unidentified victims had extensive injuries after mistreatment when they were executed, and that he was at the location where the corpses were handled after the execution. Below, the District Court reports evidence supporting his admission and evidence that is relevant for assessing whether the prosecution against [the accused's] denial proved that the victims had extensive injuries after mistreatment and whether [the accused] was at the location where the corpses were handled after the execution.

16. The Suleiman combat group's development and activities in the area in question and the attack on a military installation outside the town of Delbiya, as well as the capture of soldiers from the regime, have been confirmed by a written inquiry into the case.<sup>7</sup>

17. The Suleiman combat group conducted a significant volume of work on social media. For example, the group had several profiles on Facebook and YouTube where they uploaded information and films. Films obtained from YouTube's show the attack in Delbiya, the funeral of [K.](funeral film), the line-up of the captured soldiers, along with the armed groups who performed the attack in Delbiya (the propaganda film), the execution of the captured soldiers (Film 1), and the handling of the bodies afterwards when they were thrown into cavities in the ground (Film 0 and Film 2).

18. The National Board of Forensic Medicine has analysed the content of the films. The forensic medicine report includes the following:

“Film 1: A 51-second-long sequence where seven men are lying on the ground. They are numbered from left 1-7. The first six people from the left are on their knees dressed in long trousers. The seventh is lying flat on his stomach dressed in shorts. Behind the men lying on the ground, there are eight men with automatic weapons, and farthest to the right there is another man with a pistol in his right hand.

The gunman recites a text from the beginning of the film for the first 34 seconds, when he shoots the 7<sup>th</sup> man in his head. The shot is a start signal for the others, who now start to shoot those who are lying down. At 47 seconds, the camera pans and it is possible to see the opening in the ground that can be seen in Film 0”.

“Film 2: One minute and 11 seconds of film, apparently recorded immediately after Film 1. In the introduction, the shot men are lying on the ground, apparently lifeless and completely motionless. Persons 1 and 3 are dragged towards the "well". It seems like they are tipped in, but this cannot be seen clearly in the picture because of the panning. It can then be seen how numbers 4, 2, 5 and 6 are tipped into the "well", after which the film ends.

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<sup>7</sup> Independent International Commission of Inquiry on the Syrian Arab Republic Memorandum: response to the Swedish Prosecution Authority, pp. 2-4.



Film 0: A 31-second-long sequence, showing some form of round opening in the ground and a larger underlying well chamber or similar. From above it is possible to see that there are several, apparently deceased men in the "well". At the top is victim no. 7 from Film 1. Someone throws down a piece of tissue, which looks like a piece of brain. The film ends with a shaky camera panning, with a very brief "selfie sequence" at 30 seconds by a person not visible in "Film 1", so possibly the person who also filmed Film1."

The propaganda film: "A 2 minute and 46 seconds long film with relatively low resolution and poor technical quality. The majority consists of a speech under a green banner. A number of combatants stand with firearms pointing upwards. In the foreground, there are several men on their knees with their hands tied behind their backs. At 2 minutes 23 seconds, the camera pans and men no. 4 and 5 can be clearly recognized. The graininess of the film does not allow a better assessment of the victim's injuries other than what can be seen in Film 1. Several of the shooters in Film 1 can be seen on their knees behind the men who have their hands tied behind their backs."

19. The Swedish National Forensic Centre (NFC) has conducted an image comparison of the relevant person in this case in Film 1, and comparative images by [the accused], and has concluded that the results strongly suggest it is the same person. Film 1 has also been investigated by the NFC to determine whether the film has been manipulated by sound or objects in the film being changed around the person in question. The results very strongly suggest that this is not the case. Finally, NFC has also investigated how many shots [the accused] fired on Film 1 and the "Italian film" of the event (filmed from another angle). The conclusion is that there is visual and audio evidence of at least six shots fired by [the accused] on the films. The number of bodies thrown into the pit has been estimated at seven based on Film 1, the "Italian film", Film 0 and Film 2.

20. The evidential value of the films is very high. The crime for which [the accused] is charged has been filmed and presented to the District Court in the form of evidence. The content, along with what the NFC and the National Board of Forensic Medicine reported, provide such support to [the accused's] admission that it is proven that he has acted in the manner alleged by the prosecutor.

21. In addition, it can be noted that the person filmed from behind in the final part of film 0, has the same appearance, jacket and weapon as [the accused] in Film 1. In a comparison of the image material, the District Court also found it proven that [the accused] was present when the dead bodies were handled after the execution; [the accused] also confirmed during questioning on 12 March 2016.

22. According to a forensic medicine report from the National Board of Forensic Medicine, most of the victims (no. 1, 2, 3, 5, 6) have blue marks on their backs that strongly suggest that they arise from the effects of blunt force and also in the form of impacts/striking with a long, narrow, hard object such as a baton or equivalent. According to the statement, the appearance of the bruising that can be seen before the shooting, suggests that it occurred no more than a few days before the shooting. Other observations of findings that may indicate injuries could not be assessed in further detail, such as a bandaged left shoulder (no. 4) and a serious limp of the right leg and signs of unusable right hand (no. 7).

23. The content of the statement and what appeared in the films means that it is also proven that, at the time of their execution, the victims had extensive injuries after being exposed to mistreatment. The injuries of the captured soldiers could certainly have occurred in connection with the attack on Delbiya. The location of the injuries of the prisoners' backs and the fact that it concerns similar injuries, strongly suggests such a conclusion would be incorrect. According to the District Court, at least in the case of victims 1, 2, 3, 5 and 6, the injuries must have arisen after the soldiers were captured.

24. To summarise, [the accused's] admission, the films and other statements have proven that in Idlib Province in Syria, together and in agreement/consultation with other perpetrators, at the time and location alleged by the prosecutor, [the accused] took the life of seven unidentified persons from the Syrian state's armed forces, who had been captured and were thus put out of action. The victims had extensive injuries after being subjected to abuse. After the captured soldiers were forced to their knees or to lie on the ground, several of them with their hands tied behind their backs, [the accused] and other perpetrators fired a large number of shots at close range from firearms at the heads and bodies of the soldiers. During the incident, [the accused] fired several shots with an automatic rifle, which hit one of the victims' head and body.

25. This assessment leads the District Court to consider [the accused's] counter-fact that, under orders, he carried out a death sentence issued by a legitimate court, following a procedure that complied with the essential requirements for a fair trial in accordance with international humanitarian law, meaning that the act is not a criminal offence. In order to examine [the accused's] objection, the District Court must first examine the essential legal issue in the case, whether it is even possible for non-state actors to establish courts and, if so, what applies to the issue of requirements for a fair legal process.

#### **v. Legal issues - establishment of courts and fair trial**

##### *a) Can non-state actors establish courts?*

*- The District Court concluded that, in the context of a non-international armed conflict, a non-state actor can establish its own courts in order to (1) maintain discipline in its armed units and (2) to maintain law and order in a given territory that the actor controls, provided that the court is staffed by personnel who were appointed in a regulated manner as judges or civil servants in the justice system before the outbreak of the conflict, and that the court applies the law that was in effect before the start of the conflict, or which at least does not deviate significantly in a more stringent direction from the legislation that applied before the outbreak of the conflict.*

*- The grounds for the District Court's position are set out below.*

26. According to GA3, a captured soldier in a non-international armed conflict cannot be executed without a prior judgement, issued by regularly constituted court, affording all the necessary judicial guarantees which are recognized as indispensable by civilized peoples.<sup>8</sup> The wording of the phrase regularly constituted court may suggest that it is only a state which may establish such a court. Such an interpretation would also be in line with both the principle of sovereignty and the principle of legality; *nullem crimen sine lege; nullum poena sine lege* (no crime without law, no punishment without law). However, the previous comments of the International Committee of the Red Cross (ICRC) regarding GA3 state that the scope of the article should be as wide as possible. In the final version of GA3, for example, restrictions that the article would only apply in civil wars, colonial wars and religious wars no longer apply.<sup>9</sup> However, no detailed guidance was provided in the early comments on GA3 about how to interpret the requirement for a regularly constituted court. Although the wording of the article and the accompanying comments does not provide exact instructions, the guidance on how to interpret the requirement may be sought in other sources. After the adoption of

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<sup>8</sup> The requirement for a regularly constituted court is also contained in Article 75 of Additional Protocol I to the Geneva Conventions, Article 14 of the International Covenant on Civil and Political Rights and Article 8.2c) iv of the Rome Statute.

<sup>9</sup> Pictet, Jean S (ed.), Commentary III Geneva Convention relative to the treatment of prisoners of war, International Committee of the Red Cross, 1960, p. 31 and 36-37.

the Geneva Conventions in 1949, the meaning has been clarified, including within the framework of AP I-II and the Rome Statute (of the International Criminal Court).

27. Article 75 of AP I stipulates a requirement that a court must be impartial and regularly constituted. The ICRC's comment on the Geneva Conventions states that the Annex to Article 75 of AP I on the impartiality of the court aims to emphasize the importance of an impartial court, even in situations where there is a serious armed conflict.<sup>10</sup> Although AP I regulates international armed conflicts between states, the District Court finds that the wording of the article, as well as the ICRC's comments, indicates a shift in focus from the question of how a court is established, towards an assessment of whether a court maintains fundamental procedural guarantees. Such a shift in approach is confirmed by Article 6 of AP II, which merely lists as a requirement that a court must offer the necessary guarantees of independence and impartiality. The ICRC's comments on the article state that the requirement that the court should be regularly constituted is replaced by a requirement for independence and impartiality. It was considered unlikely that a court could be regularly constituted by a non-state actor.<sup>11</sup> Article 8.2.c) iv) of the Rome Statute also imposes a requirement for a regularly constituted court. "Elements of Crime", a non-binding commentary on the interpretation and application of the articles of the Rome Statute, states that a regularly constituted court means a court that meets the essential requirements for independence and impartiality, and also that the court can guarantee all other legal guarantees that are generally recognized as indispensable within international law.

28. In addition to what is stated above, there is also reason to point out what can be considered applicable under customary law. The ICRC has conducted a study of current customary international law. The study states in rule 100 that no one can be charged or sentenced except in a fair trial that upholds fundamental legal guarantees. The ICRC argues in the study about the requirements that may be imposed on a legal procedure on the basis of customary law, and it states that the requirement that a court must be regularly constituted means that it must be appointed and established in accordance with the laws and procedural rules applicable to a specific country.<sup>12</sup> However, the emphasis in the proposed rule, as in the comment, is on the requirement that the court must be independent and impartial.

29. When questioned in the District Court, [expert witness M.] noted that there is an inherent contradiction in GA3, in that the article explicitly prohibits acts involving violence against a life or person, especially murder in all its forms, mutilation, cruel treatment and torture. Since the article applies to non-international armed conflicts, however, this entails that it also imposes requirements on non-state actors to maintain discipline in their own armed forces. In the event that the requirement for a court to be regularly constituted is strictly interpreted in relation to the principle of sovereignty, such control of military units would be impossible. According to [expert witness M.], this means that a non-state actor must be able to establish courts in order to maintain discipline in their own units. The District Court shares [expert witness M.'s] view in this regard.

30. Based on the above, the District Court concludes that the principle of sovereignty does not prevent a non-state actor from establishing a court. The requirement that a court must be regularly constituted should rather be regarded as fundamentally linked with the question of whether the court upholds fundamental legal safeguards, such as being independent and impartial.<sup>13</sup> Naturally, such a

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<sup>10</sup> Sandoz, Yves, Swinarski, Christophe and Zimmerman, Bruno (ed.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Dordrecht, Kluwer Academic Publishers Group, Dordrecht, International Committee of the Red Cross, 1987, p. 3084.

<sup>11</sup> A.a.a, p. 4600.

<sup>12</sup> Henckaerts, Jean-Marie and Doswald Beck, Louise, Customary International Humanitarian Law, volume I; Rules, Cambridge, Cambridge University Press, 2009, p. 100.

<sup>13</sup> Such a conclusion is also confirmed by the 2016 commentary on GA3 (see ICRC, Commentary on the First Geneva Convention, 2016, item 678).

court cannot apply laws at its own discretion: *nullum crimen sine lege, nulla poena sine lege*. It follows expressly from Article (4)(c) of AP I and Article 6(2)(c) of AP II, which may also be regarded as having the status of customary law, that it is only states that may introduce criminal law provisions by virtue of their respective constitutional rules. It also follows from the presumption of innocence referred to in Articles 75(4)(d) of AP I and 6(2)(d) of AP II, that a person accused of crimes shall be presumed to be innocent until he is declared guilty under the law. Even if a non-state actor establishes a court, those who are under the jurisdiction of the court must be able to comply with the laws applied by the court.

31. As stated above, the District Court arrives at the same conclusion as [expert witness M.] put forward in his testimony. In a non-international armed conflict, a non-state actor can establish courts in order to (1) maintain discipline in the actor's own armed units and (2) to maintain law and order in a given territory that the actor controls, provided that the court is staffed by personnel who were appointed in a regulated manner as judges or civil servants in the justice system before the outbreak of the conflict, and that the court applies the law that was in effect before the start of the conflict, or which at least does not deviate significantly in a more stringent direction from the legislation that applied before the outbreak of the conflict.

*b) What is entailed in the requirement for independence, impartiality and a fair trial*

*- The District Court has concluded that a court established by a non-state actor in the context of a non-international armed conflict, must meet requirements of being independent and impartial, as well as being able to meet essential requirements for a fair trial.*

*- A detailed description of the position and what these requirements entail is provided here.*

32. As the District Court found above, a court established by a non-state actor must fulfil the requirement of being independent and impartial and must ensure the defendant receives a fair trial. The question is, what do these requirements entail?

33. An independent court requires that there is a division of power: the judiciary should be structurally independent from other state actors in order to prevent unjustified interference in the judicial process, its function and authority should be clearly specified in law and it should have exclusive jurisdiction over matters within its authority. Judges' terms of employment must also be such as to protect the individual judge from threats or other external influences. The requirement for impartiality is intended to prevent challenges to the judge, or that the judge otherwise takes irrelevant considerations into account.<sup>14</sup> Although independence and impartiality constitute two distinct legal principles, they are mutually dependent on each other in that they are intended to ensure that the defendant receives a fair trial, where the judgement is not predetermined.

34. GA3 does not state what requirements can be imposed for a trial to be considered fair according to the convention. The text in GA3 that the court's system of justice must offer the guarantees that are held by civilized peoples to be indispensable, cannot be understood in any way other than referring to the requirements for a fair trial arising from customary international law. This essentially means the following requirements: (1) presumption of innocence, (2) the right to a defence before and after a trial, (3) the right not to testify against oneself, (4) the right to a trial within a reasonable time, (5) the right to hear witnesses and to present one's own evidence, (6) the right to a public trial and a public judgement, and (7) the right to appeal.<sup>15</sup> These principles also follow from Article 75 of AP I and Article 6(2) of AP II.

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<sup>14</sup> Clapham, Andrew and Gaeta Paola (ed.) *The Oxford handbook in International Law in armed conflict*, Oxford, Oxford University Press, 2014, p. 419-421.

<sup>15</sup> A.a.a, p. 423-425; Henckaerts and Doswald-Beck, p. 352f.

**vi. [The accused's] claim that he executed a death sentence issued by a legitimate court following a fair trial**

- *The investigation of the case shows that the preconditions did not exist at the time to establish a court that meets the requirements to be independent and impartial, and which was able to meet the essential requirements for a fair trial in accordance with international humanitarian law.*

- *[The accused's] actions have been manifestly unlawful and therefore he cannot escape responsibility.*

- *This section explains the reasons for this.*

*a) Introduction*

35. General principles of criminal law were compiled and regulated for the first time in part 3 of the Rome Statute. These principles are only intended to be applied by the International Criminal Court. There is thus no need for them to be transposed into national legal systems and there is no obligation based on customary law in this regard, with a few exceptions. The District Court nevertheless chooses to touch upon the part of Article 33 relating to such an objection, as [the accused] has done. According to the main rule established there, the fact that someone has committed a crime that falls within the jurisdiction of the court, on the orders of e.g. a government or a military, cannot exempt that person from responsibility. The article, which is only applicable to war crimes, makes an exception if a person has a legal obligation to obey such an order, provided that the order was not manifestly unlawful, and the person did not know that it was unlawful.<sup>16</sup>

36. In Swedish law, Chapter 24 of the criminal code contains rules on discharge from responsibility. Questions about superior orders that are regulated in Article 33 of the Rome Statute have their equivalent in Chapter 24 Section 8 of the Criminal Code. According to that provision, a person may be relieved from responsibility for an offence committed under orders from a superior. In such cases, responsibility shall not be attributed if the person, in view of the nature of the subordinate relationship, the nature of the act or the circumstances in general, was obliged to obey the order. However, this does not mean that so-called blind obedience applies. It follows from general legal principles that the duty to obey is not unconditional in cases where the ordered act is criminal or otherwise manifestly unlawful (see NJA 1987, p. 655).

37. When it comes to assessing what is proven in the case, it is up to the court to consider all investigations. This means specifically, in respect of each relevant circumstance, to consider evidence that helps to reveal what has occurred. In view of [the accused's] objection, the central issue in the case is whether [the accused], as he stated, was ordered to carry out a death penalty imposed by a legitimate court, following a procedure that met the essential requirements for a fair trial in accordance with international humanitarian law. This means investigating what preceded the action and how this affected [the accused's] actions.

*b) Legitimate court and fair trial*

38. As the District Court has ruled on the issue of law above, a non-state actor in the context of a non-international armed conflict may establish its own courts in order to (1) maintain discipline in its armed units, and (2) to maintain law and order in a given territory that the actor controls. Another precondition is that the court is staffed by personnel who, before the outbreak of the conflict, were appointed as judges or officials in the justice system in a regular manner, and that the court applies the law that was in effect before the start of the conflict, or which at least does not deviate significantly in a more stringent direction from the legislation that applied before the outbreak of the conflict. The

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<sup>16</sup> Criminal responsibility for genocide, crimes against humanity and war crimes, Prop. 2013/14:146 p. 56 and 59.



court must therefore meet the requirements of being independent and impartial, as well as being able to meet the essential requirements for a fair trial.

39. The following section describes and considers the evidentiary facts that are relevant to [the accused's] criminal law objection.

□ the Suleiman combat group was an islamist unit without any close association with the FSA

40. The following circumstances support the prosecutor's view that the Suleiman combat group has no connection to the FSA and contradict [the accused's] information that is the case. The Suleiman combat group is not included as a key unit of the FSA, which is supported by Idlib's military council under the leadership of [...]. Idlib's military council was linked to less than 70% of all the armed rebel groups that were active in the Idlib region, with cooperation problems based on the FSA's secularized view.<sup>17</sup>

41. Posts on Facebook on 7 May 2012 support the information that the Suleiman combat group did not use the Free Army's banner, and also show contradictions between the FSA and the Suleiman combat company regarding the content of the revolution. The FSA flag also cannot be observed in any of the films in question. In an interview with a German journalist, the leader, [S.], also stated that the Suleiman combat group was not part of any organisation.

42. [The accused] has posted photos of the Suleiman combat group on Facebook, including from 15 August 2012, where he himself commented on the photo stating "Together with my brothers on the journey and in the faith".

43. On 18 August 2012, a photo was published on the Suleiman combat group's Facebook profile of, among other things, the members [the accused], [I.], [A.] and [M.] with the words "May Allah Protect You! You are the war lion".<sup>18</sup>

44. On his Maher Issa Facebook profile, [S.] has posted images of the Suleiman combat group, as well as posts with islamist propaganda from June to September 2012, stating, among other things, "that a soldier in the Islamic State is worth ten soldiers in the other brigades [...] and that the Islamic State defends Greater Syria and its people". Other members of the Suleiman combat group have also posted similar Facebook posts on their profiles and liked each other's posts.

45. It is obvious based on the evidence that the Suleiman combat group did not act under or as part of the secularized FSA, but was instead an independent islamist/nationalist armed group. This conclusion is also supported by [expert witness L.], who testified that what was said in the films is comprised of an islamist terminology with fairly general Sunni-islamist content, mixed with nationalist and revolutionary thinking, which in later Facebook posts developed in a more islamist direction.

□ Lack of control over territory and population

46. The possibility of establishing courts should be seen in light of opposition armed groups exercising limited control over the territory and population in Syria. Massacres committed by such groups must be assessed in this context.<sup>19</sup> During spring 2012, armed opposition groups had created so-called "safe zones" in Idlib's hinterland, where they retreated after the regime took over the provincial town of Idlib and other central urban areas. In June 2012, major strips of land were

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<sup>17</sup> Report from the Institute for the Study of War, Middle East Security Report no. 5 – "Syria's maturing insurgency", June 2012, p. 25.

<sup>18</sup> Facebook profiles [...].

<sup>19</sup> Independent International Commission of Inquiry on the Syrian Arab Republic, Report no. 4, p. 51, para. 43-44.

controlled in the area by a large number of opposition armed groups with an absence or major deficiencies in the operational management and control by the FSA.<sup>20</sup>

47. Information provided by [the accused] in questioning on 23 March 2016 supports the information in the general reporting on how opposition armed groups exercised limited control over the territory and population in Syria during the relevant period. Regarding the relevant area in this case, between Kafar Kila and Delbiya, it is noted that [the accused] stated that "during this period, this area was governed and controlled, the entire areas, by the regime" and "all of these areas that we are talking about now that are on the map (see image below) were 90% governed and controlled by the regime".



Image. Kafar Kila (2) and Delbiya (red circle farthest to the left)

48. [Expert witness K.], who defected on 17 June 2012, testified that the situation was chaotic during the relevant period and that there were no courts or any legal proceedings in Idlib's hinterland.

49. Overall, reported circumstances now suggest that there was no adequate control of a given territory, which is a prerequisite for the establishment of courts.

#### □ Quasi-legal proceedings

50. Members of armed opposition groups committed serious violations of international humanitarian law in 2012 in the form of, inter alia, extra judicial executions in the Idlib region similar to the alleged event.<sup>21</sup> It has not been possible to establish that the FSA had control over the various militant rebel groups that were active in the different areas of the country during the period from 29 July 2011 until May 2012. Refer to the District Court's assessment of the Suleiman combat group above. Quasi-judicial units with so-called courts were established on an ad hoc basis in areas where rebel groups had sufficient control over a particular territory in order to fill the void left by law

<sup>20</sup> Report from the Institute for the Study of War, Middle East Security Report no. 5 - "Syria's Maturing Insurgency", June 2012, p. 18, and Amnesty International Briefing, dated 14 March 2013, "Syria: Summary killings and other abuses by armed opposition groups" p. 1.

<sup>21</sup> Report from Human Rights Watch, dated 17 September 2012 - "Syria: End Opposition Use of Torture, Executions", p. 1-3, and a report from the Institute for the Study of War, Middle East Security, Report no. 5 - "Syria's Maturing Insurgency", June 2012, p. 27-28, and Amnesty International Briefing, dated 14 March 2013, "Syria: Summary killings and other abuses by armed opposition groups" p. 5.

enforcement authorities and courts that no longer operated there.<sup>22</sup> The judges in these so-called courts were a mix of imams and judges who had defected. They applied both Islamic and Syrian law, depending on which rebel group had established the court. In this quasi-legal system, those who participated in hostilities against the opposition were punished by death. There was no right to a defence counsel. It was not even allowed to mount a defence. There was also no right to appeal. Rebel groups could also have so-called questioning committees, where members conducted questioning and submitted evidence to the court that they themselves established. In these contexts, there is compelling evidence that torture occurred during questioning. It is clear from the reports that the trial-like procedures that were conducted, failed to meet the essential requirements in international humanitarian law for due process.<sup>23</sup>

51. Information in the general reporting on how participation in hostilities against the opposition was punished by death, and the absence of a defence in this quasi-judicial system, is supported by information provided by [the accused] in questioning on 23 March 2016 regarding the events in this case. When asked what crime they were sentenced to death for, it is noted that [the accused] responded: "that they shot at the people, at these groups and at the Free Army". It is further noted that when asked by whom and where they were sentenced to death, [the accused] responded: "The decision was made in the name of the military council and the judicial council of the Free Army ordered that they have been sentenced to death. The seven people and not nine. The other two were not considered in the same way. They were not on the roof shooting, they were hiding" and "there was an agreement between groups that stated that if the soldier from the regime did resist and killed, then it is clear we must kill him". When asked if it was a general law, [the accused] replied: "Yes, of course, yes. So, the fact that they attacked in this way, attacked this military facility, and it had a bad reputation in this way, and that they started to resist immediately, the judgement in the case was already made." When asked if those convicted had any legal assistance, he responded: "I do not think so. All the people were against them" and "it is not like they deserve to be assisted by a lawyer" and "there was a state of war, things differ from (inaudible) when there is peace".

52. Based on what has now been reported and what has emerged about developments in the region, major questions can be raised about whether the court that [the accused] said he heard about, was even staffed by personnel who had been appointed in a regular manner as judges or civil servants in the court system before the outbreak of the conflict, and about whether the court applied the law that prevailed before the outbreak of the conflict. Instead, the circumstances indicate that this was not the case and so, the legislation applied deviates significantly in a more stringent way from the legislation preceding the outbreak of the conflict.

53. Overall, the investigation in the various reports from international organisations and from [the accused's] statements when questioned by the police, suggest that members of the armed opposition committed serious violations of the Geneva Conventions against so-called hors de combat, and thus also against the captured soldiers in this case.

#### □ Fair trial - the timing of the attack and the execution

54. The time difference between the time of the attack on the military post in Delbiya and the time of the execution outside Kafar Kila is of major importance for [the accused's] objections and the question of a fair trial. The prosecutor and [the accused] are of different opinions on this issue. The following comments made on the Suleiman combat group's Facebook account support the view of the

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<sup>22</sup> Independent International Commission of Inquiry on the Syrian Arab Republic Memorandum: response to the Swedish Prosecution Authority, p. 1-2, and Report no. 4, p. 56-57 para. 15-17.

<sup>23</sup> Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic, dated 26 June 2012, p. 20, para 106-107.





prosecutor that there was a brief time span, and they contradict [the accused's] statement that it concerns a slightly longer, though brief time span.<sup>24</sup>

*4 May 2012 at 20:35 UTC:*

"In the name of God, the Merciful

Statement by the Suleiman combat group,

My brothers, please pray for the heroes of our division. They are currently carrying out an operation in their area in collaboration with the Ahrar Alshamal Sermin battalion. After the operation is complete, we will publish the operational details, and may God give us success."

*05 May 2012 at 03:44 UTC:*

"In the name of God, the Merciful

Detailed statement on the operation of the Suleiman combat group in collaboration with the Ahrar Alshamal Sermin battalion, dated 5 May 2012, from 24:00-03:00 at dawn (Quran). We would like to delight you with the news of the martyrdom of the hero and the jihadist [K.] from Hama, [H.] who is known as[A.], we ask God to receive our martyrs. Five injured members of the division's jihadists, [M.] from the town of Bensch, [A.] from Hama, first assistant [Y.] from Kafer Nebode, [J.] from Harem, [A.] from Kafre Keyla, we hope God helps them to a speedy recovery. Nine live captured by Bashars Nusairi's leagues, we have also been able to take over the following weapons:

We will publish full films from the entire operation later."

*06 May 2012 at 22:34 UTC:*

"Now we are publishing films about the martyr [K.] from the Suleiman combat group, who was killed during the offensive operation against the security forces and Nusiri Shabihas centres concentrated in Dilibia town, from 24:00-03:00 at dawn. The city is 700m from the Turkish-Syrian borders and this martyr is from Hama, [H.], Mercy to our martyrs and patience to their relatives, Long live Syrian, free and proud."

55. A question was also answered on the Suleiman combat group's Facebook account on 7 May 2012 at 22:27 UTC about the date of the operation, with the same information, namely "occurred 5/5/2012 and it lasted from 24:00 until 03:00 at dawn."

56. According to the District Court, therefore, it is completely clear that the attack in which the relevant Syrian soldiers were captured, took place on the night of 5 May 2012, even though it was actually commenced at the end of the day on 4 May 2012. The information about 4 May 2012, which originates from the funeral film, does not lead to any other assessment in this context. It is more likely and reasonable under the circumstances, that the explanation for this information is that the death of [K.] occurred late on 4 May 2012.

57. As regards the date of execution, the following considerations are taken into account regarding the circumstances.

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<sup>24</sup> Time markings on Facebook and YouTube takes place in UTC. Syrian time zone means UTC +02:00.

58. The so-called propaganda film was published on YouTube on 7 May 2012 at 11:04. In addition, a film was published with gunfire from the same source as the sound of the execution film on YouTube on 7 May 2012 at 19:10 UTC.

59. On the Facebook page, "Manifestazioni Siriande a Milano", the so-called propaganda film was published around 17:00 on 8 May 2012. The film begins by showing a Koran quotation, which Mujahedin often quote: "Among the believers are men who have been faithful to their covenant with Allah. Some of them have given their lives; others await [their turn] without hesitating in their determination." Immediately following the Koran verse, some pictures show a group of about 30 armed fighters, lined up on two sides surrounded by the Islamic flag and the flag of the Syrian uprising. At the bottom right, [the accused] can be seen on his knees.

60. The time of sunrise and sunset on 6 May 2012 were 05:36 and 19:23 respectively. Comparing the length of the shadows that can be observed on the propaganda and execution films, shows that the event occurred at sundown. In view of the time of the publication on YouTube of the so-called propaganda film, and [the accused's] statement that the execution took place in close proximity to the propaganda film, it can be concluded that the execution took place in the evening before sunset on 6 May 2012.

61. The circumstances are also supported by what [the accused] stated during questioning on 23 March 2016, where it was noted: "I was in Turkey for 2-3 days and then I travelled to Syria", and in questioning on 27 May 2016, where it was noted: "stayed in Turkey in the same town for two days and on the third day we travelled to Syria". When asked about the prisoners' injuries in questioning on 23 March 2016, he also stated "they slept one night there". According to the District Court, this information is consistent with other evidentiary facts on the issue of the length of time between the capture and the execution, i.e. that they were only kept prisoner for one night, between 5-6 May 2012, before they were executed.

62. The prosecutor has thus proved that the length of time between the capture and the execution was approximately 1.5 days, or a maximum of 41 hours. Naturally, this is a circumstance that strongly contradicts [the accused's] statement that, under orders, he carried out a death sentence issued by a legitimate court after a fair trial.

#### □ Motivation of revenge and improper handling of corpses

63. Other circumstances that contradict [the accused's] statement that the execution was preceded by a fair trial by a legitimate court, resulting in a death sentence, consist of what is otherwise shown in the propaganda film, the execution film and the film about the handling of the dead bodies. It is stated at the execution "We will be revenged, and it is a binding promise. And you will pay for our blood twice by your blood. Day by day, and blood vengeance is our requirement". There are no statements about the names of the convicted persons or what they have been charged with and convicted of, or even that it concerns the implementation of a death sentence issued by a court. After the execution, members of the Suleiman combat group raise their weapons, including [the accused], as in a victory gesture. Subsequently, the dead bodies are desecrated by being handled in an extremely offensive manner. Offensive statements are also made in this context. Overall, the circumstances are such that it is difficult to see that it was an enforcement of a sentence issued by a legitimate court following a fair trial, as [the accused] claimed. Instead, the evidence supports the contention that the motivation for the execution of the captured soldiers was to demand revenge.

#### *c) Conclusion*

64. Overall, the District Court finds that, based on the investigation of the case, it can be ruled out that any trial whatsoever took place. The preconditions simply did not exist at the time to establish a court that meets the requirements to be independent and impartial, and which was able to meet the



essential requirements for a fair trial in accordance with international humanitarian law. And even if any legal process similar to a trial might have taken place, in view of what has emerged about the time during which the proceedings would then have taken place, it can be ruled out that such proceedings met the essential requirements of a fair trial. This must all have been clear to [the accused].

65. In view of this position, it will be assessed whether what has been stated by [the accused] and reported under III B above should lead to another conclusion. The evidence contradicts that the events occurred in the manner he has described. The general and vague information provided by [the accused] regarding the implementation of a death sentence issued by a legitimate court following a fair trial, is not supported by the evidence in the case. What [the accused] has said does not weaken the evidential value of the prosecutor's evidence.

66. The charge is proven. The ordered act performed by [the accused] was manifestly unlawful and he cannot therefore escape criminal responsibility.

#### **vii. Classification of the crime**

*- The investigation has shown that there is a connection (nexus) between the charged acts and the armed conflict involving serious violations of the rules of international humanitarian law. The acts have thus been regarded as gross crime against international law.*

*- The reasons for this assessment are set out here.*

67. As noted in section (A iii) above, there was a non-international armed conflict in Syria, which means that the guarantees specified in GA3 and AP II are applicable. [The accused's] criminal acts were carried out in the context of the armed conflict, something that played a decisive role for [the accused's] ability and decision to perform the act. The victims were captured soldiers who belonged to the opposite side of the conflict. He has also performed the acts in a role as a member of the Suleiman combat group and the actions served a specific purpose. It is therefore completely clear from the investigation that there is a connection (nexus) between the prosecuted acts and the armed conflict.

68. Having regard to the relationship that exists between the acts and the armed conflict, these are considered to be serious violations of the rules of international humanitarian law. Through the said acts against seven persons who were hors de combat, [the accused] committed serious violations of GA3, as well as generally recognized principles relating to international humanitarian law.<sup>25</sup> Accordingly, [the accused's] actions are judged under criminal law to be a crime against international law under Chapter 22 Section 6(1) of the Penal Code. The offence is considered gross because many people were executed in particularly cruel circumstances, where the victims, who at the time had extensive injuries, several of them after being mistreated, completely lacked the opportunity to defend themselves and obviously understood that they were to be killed.

#### **B. EXPULSION**

*- The District Court finds that [the accused] shall be expelled from Sweden with a ban on returning.*

*- The reasons for this are set out here.*

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<sup>25</sup> Cf. inter alia Article 147 GC IV.

69. According to the statement from the Swedish Migration Agency, there is an ongoing case concerning the revocation of a permanent residence permit and a declaration of refugee status regarding [the accused]. However, the matter has not yet been settled.

70. [The accused] is convicted of particularly serious crime and it could lead to serious danger to public order and safety if he is allowed to stay in Sweden. He has only been here for a few years and he has no other connection to Sweden. The preconditions for expelling him from Sweden therefore exist.

71. With regard to the possibility of enforcing an expulsion order, the Swedish Migration Agency finds that generally everyone returning to Syria runs an individual risk of being subjected to such treatment as stated in, inter alia, Article 3 of the European Convention, corresponding to Chapter 4 Section 1 and Chapter 12 Section 1 of the Aliens Act (2005:716), i.e. death penalty, corporal punishment, torture or other inhuman or degrading treatment or punishment. The Swedish Migration Board also adds to the current situation in Syria, the fact that [the accused] has been featured in the media. The conclusion according to the Swedish Migration Board, is that currently it not possible to enforce a decision to expel [the accused] to Syria, but the obstacle is deemed to be temporary.

72. The District Court makes no further assessment regarding the existence of the impediments to enforcement and finds that [the accused] shall be expelled from Sweden with a ban on returning.

## **C. SANCTION AND SENTENCING**

*The sentence has been set at imprisonment for life. The reasons for this position are set out here.*

73. At the time of offence, the punishment for gross human rights violations was imprisonment for a maximum of 18 years or for life.

74. [The accused] has actively participated in a mass execution of persons who, according to international humanitarian law, must be guaranteed protection. The case involves very serious crimes with such a high penal value that the punishment cannot be determined as anything other than imprisonment for life.

## **D. OTHER**

### **i. Claims for damages**

75. The preliminary investigation has been very extensive and has lasted for a long time. The case involves what is still a relatively unusual legal area for the Swedish judicial system, and includes legal issues that have not previously been investigated under international humanitarian law. Overall, this has naturally required a lot of work by the defence council.

The prosecutor has not objected to the compensation requested. Upon review of the cost statement, the District Court finds that the reported activities were necessary, and the requested compensation is reasonable.

### **ii. Detention etc.**

76. There is a risk that [the accused] will abscond or otherwise evade execution of the sentence [the accused] must therefore remain in detention until the verdict in respect of sentencing and expulsion gains legal force against him.



77. [The accused] is sentenced for a crime meriting a prison sentence, he must therefore pay a fee to the victim of crime fund.

## **V. HOW TO APPEAL**

Appeals, see annex 1 (DV 400), must be submitted to the District Court no later than 9 March 2017. It must be stated in the appeal that it is addressed to Svea Court of Appeal.

